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Supreme Court of the United States

KAWASAKI KISEN KAISHA LTD.
AND K-LINE AMERICA, INC.,
Petitioners,

v.

REGAL-BELOIT CORPORATION, et al.,
Respondents.

UNION PACIFIC RAILROAD COMPANY,
Petitioner,

v.

REGAL-BELOIT CORPORATION, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE INTERNATIONAL GROUP OF PROTECTION AND INDEMNITY (P&I) CLUBS, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The decision of the lower court in this case, if allowed to stand, would introduce substantial uncertainty into the law governing loss of or damage to cargo carried within the United States as part of a multimodal carriage between a place in a non-adjacent foreign country and a place in the United States. The uncertainty would adversely affect the cost to shipowner, ship operator, and charterer members of the mutual Protection and Indemnity Associations ("Clubs") comprising the International Group of P&I Clubs ("Group"). The mutual liability insurance provided by the Clubs rests to a great extent on all insured members being exposed to risks common to the use and operation of ships and to liabilities defined and limited by the same or similar laws. It is for this reason that the Clubs strongly support and rely on regulation by way of international rather than regional or domestic legislation. That reliance would be damaged in respect of cargo liabilities by the uncertainty introduced by the possibility that the Carmack Amendment ("Carmack")[2]

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the amici curiae represented in this brief made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk of the Court. The parties were notified ten days prior to the due date of this brief of the intention to file.

[2] In 1906, Congress amended the Interstate Commerce Act by passing the Hepburn Act. The portions of the Hepburn Act

(Continued on following page)

would govern the U.S. inland part of multimodal carriage. Even if we assume *arguendo* that Carmack would apply consistently, Carmack itself is not consistent.

The Group is comprised of thirteen principal Clubs located worldwide including the United States, namely: The American Steamship Owners Mutual Protection and Indemnity Association, Inc.; Assuranceforeningen Gard (Gjensidig); Assurance-foreningen Skuld (Gjensidig); The Britannia Steam Ship Insurance Association Ltd.; The Japan Ship Owners' Mutual Protection & Indemnity Association; The London Steam-Ship Owners' Mutual Insurance Association Ltd.; The North of England Protecting and Indemnity Association Ltd.; The Shipowners' Mutual Protection and Indemnity Association (Luxembourg); The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd.; The Steamship Mutual Underwriting Association Ltd.; The Steamship Mutual Underwriting

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dealing with interstate carrier liability, commonly known as the Carmack Amendment, were originally codified at 49 U.S.C. § 20(11) (1976). The Carmack Amendment was later extended to motor carriers by the Motor Carrier Act of 1935, ch. 498, 49 Stat. 543 (1935). The Carmack Amendment was recodified in 1978 (1978 Recodification, Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack] 92 Stat. 1359 (1978), 49 U.S.C. §§ 10730 and 11707) and again in 1996. The Carmack Amendment is now found at 49 U.S.C. § 11706 (rail carriers) and 49 U.S.C. § 14706 (motor carriers). This brief shall refer to this legislation as the "Carmack Amendment" or as "Carmack." *See* K-Line Pet. App. 62a-91a.

Association (Bermuda) Ltd.; Sveriges Ångfartygs Assurans Förening (Swedish Club); United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd.; and The West of England Ship Owners' Mutual Insurance Association (Luxembourg) respectfully submit this brief as amici curiae in support of Petitioners.

Amici Clubs are thirteen principal mutual marine liability insurance associations. The Clubs are "associations of shipowners banded together to spread and absorb mutual liabilities falling on their members." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 76 (2d ed. 1975).[3] The members of the Clubs are owners, operators, and charterers of ships of practically all maritime nations. The thirteen Clubs represented here insure approximately ninety-two percent (92%) of the world's ocean-going ship tonnage carrying approximately 90% of world trade.

The individual Clubs as amici curiae here are members of the International Group of P&I Clubs, which, inter alia, places reinsurance for its member Clubs. The Clubs compete with one another. Above each Club's individual retention, currently $7 million each and every occurrence, they do pool, that is share, cargo and other types of claims associated with the

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[3] For a discussion on the history and function of P&I clubs, see Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19-12 (4th ed. 2004), and Mark Tilley, *The Origin and Development of the Mutual Shipowners' Protection & Indemnity Association*, 17 J. Mar. L. & Com. 261 (1986).

use and operation of ships, e.g. pollution claims, wreck removal claims, death and injury to passengers and crew inter alia up to an amount of approximately $6 billion per occurrence. Claims between $50 million and $3.05 billion each and every occurrence are protected by market reinsurance purchased collectively through the International Group. This reinsurance contract is written annually and 18 of the world's "top 20" reinsurers participate in the contract. It is the largest marine contract written each year. The Clubs are able to provide this high cover because the cargo and other risks insured by the Clubs are insured on the same terms and conditions by each Club and are therefore capable of being pooled. Currently Club cover for cargo claims essentially is limited to liabilities imposed under the liability regimes contained in the Hague, the Hague/Visby Rules or other legislation incorporating these regimes, e.g. the U.S. Carriage of Goods by Sea Act ("COGSA").[4] This consistency of cover allows the risks to be

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[4] U.S. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936), Pub. L. No. 109-304, 120 Stat. 1485 (2006), *reprinted in* note following 46 U.S.C. § 30701; International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels, Aug. 25, 1924, 51 Stat. 233, 247, 120 L.N.T.S. 155 ("Hague Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-1 (7th rev. ed. 2007); Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on Aug. 25, 1924, Feb. 23, 1968, 1412 U.N.T.S. 128 ("Hague/Visby Rules"), *reprinted in* 6 Benedict on Admiralty, Doc. No. 1-2 (7th rev. ed. 2007).

underwritten by individual Clubs and in the event the claim exceeds the Club's retention, to be pooled.

Mutuality is based on the sharing of common as opposed to individual risks. The concept relies heavily on the commonality and uniformity of the risks to which those parties mutualizing the risk are exposed. Lack of uniformity as is the case with the Carmack Amendment, because the Carmack Amendment does not itself provide uniform terms, undermines the mutual concept. Carmack permits U.S. inland carriers to agree to varying limitations of liability and other contractual terms if certain conditions are met. Carmack does not provide a consistent liability limit as do the Hague Rules, the Hague/Visby Rules, and COGSA.[5] Where cargo is shipped worldwide from ports and places other than the U.S., it is not possible for carriers to arrange their U.S. inland carriage terms with any certainty or predictability if Carmack

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[5] Compare § 4(5), ch. 229, 49 Stat. 1207 (1936) *reprinted in* note following 46 U.S.C. § 30701 ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.") with 49 U.S.C. § 11706(c)(3)(A) ("A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which – (A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; . . .").

applies to the U.S. inland carriage. The parties to contracts for U.S. inland carriage may and do agree to various differing amounts of liability for different contracts. Carmack's internal inconsistency prevents uniformity of risks, which as is said above is the basis of mutual insurance. Trade amongst nations other than the United States does not present this problem. As a result, the Clubs might impose a surcharge for covering multimodal carriage in the United States. If that were the case, multimodal carriers might obtain separate insurance for the U.S. inland portion of the multimodal carriage or decide to limit the extent of the multimodal service that they currently provide, so as to exclude the inland portion of the carriage. If the carriers adopted this approach, the reliability associated with the cover provided by the Clubs would be lost to the detriment of third-party persons filing claims against carriers. Moreover the cost of trading with the United States would thus likely be higher than the cost of trading with other nations.

INTRODUCTION

This case raises an issue that affects virtually all the multimodal carriage of cargo between non-adjacent foreign countries and the United States. In 2008, U.S. ocean container ports handled 28.2 million

TEUs,[6] nearly all of which were transported throughout the country by either rail or truck carriers. U.S. Dep't of Transp., Bureau of Transp. Statistics, America's Container Ports: Freight Hubs That Connect Our Nation to Global Markets 3, 16 (2009). Uniformity and predictability of maritime law are essential not only to the Amici P&I Clubs, but also to world commerce. Insurance may be arranged for vessel interests more efficiently if the law that governs the carriage of cargo is uniform and predictable. The application of one law, COGSA, throughout the entire door-to-door multimodal carriage of goods is extremely beneficial to all parties involved in multimodal carriage and the efficient operation of multimodal movements. *See* Pet. App. 48a-61a.[7]

If, instead of COGSA, Carmack were to apply to the U.S. inland part of multimodal carriage, the inland carriers or the contracting carriers would, according to the lower court opinion in this case, have to give the shipper a fair opportunity to demand full Carmack coverage, which is quite different than COGSA. Full Carmack rights would have to be offered as the primary regime to govern the inland carriage. Pet. App. 33a-35a.

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[6] Because shipping containers are of various lengths, the TEU (twenty foot equivalent) was developed as the standard measure for counting containers. One 40 foot container equals 2 TEUs.

[7] "Pet. App." refers to the Appendices to the Petition for Writ of Certiorari filed by Petitioners on June 18, 2009.

Offering such a fair opportunity and the notice of the alternative terms required by Carmack to the shipper would be very difficult if not impossible in practice. In multimodal carriage, the inland carrier does not contract directly with the shipper. The shipper contracts with the contracting carrier, which may be a non-vessel operating common carrier ("NVOCC") or a vessel operating common carrier ("VOCC") or some other kind of contracting carrier. The contracting carrier might contract directly or indirectly with the U.S. inland carrier. The contracting carrier probably would not know which inland carrier would perform the U.S. inland carriage or the terms of that unknown inland carrier's contract at the time it contracted with the shipper. Without that knowledge, the contracting carrier could not give the shipper notice of the alternate terms a particular inland carrier wished to use.

Moreover, if more than one law were to govern various parts of each carriage, resolution of claims for loss or damage would be needlessly and wastefully complicated. Before the merits of a claim could be addressed, the applicable law (Carmack or COGSA) would have to be determined. The applicable law could not be ascertained until the location of the loss or damage and the location of its cause was determined.[8]

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[8] Moreover, if COGSA governed the ocean part of the carriage and Carmack governed the land part, the receiver would want to make a claim against both the ocean carrier and a land carrier, whose liability may be higher than the ocean carrier's. Carmack imposes a strict, insurer-type liability scheme

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The location of the loss or damage or the location of its cause may be difficult or impossible to prove. Ocean containers used for multimodal transportation are generally not opened during their carriage; as a result, damage or loss is often not discovered until the container reaches its final destination and is opened by its receiver. If different legal regimes required shippers to open and inspect containers as they were transferred from one mode or party to another, the transportation would be slowed and cargo might be damaged or pilfered. The ocean container has greatly reduced damage and loss during transportation.[9] This advantage should not be lost by a need to open containers in transit.

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on the carrier while COGSA employs a fault-based liability scheme. *See Sompo Japan Ins. Co. of America v. Union Pacific R.R. Co.*, 456 F.3d 54, 58 (2d Cir. 2006); *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 9 (1st Cir. 2003); *see also Missouri P. R. Co. v. Elmore and Stahl*, 377 U.S. 134, 137 (1964). If COGSA governed the entire carriage, the receiver could prove its prima facie case simply by proving delivery of a certain quantity of cargo to the carrier in good order and condition and delivery by the carrier in damaged condition, or that some cargo was missing when it was delivered to its receiver. The claim would be governed only by COGSA. There would be no reason for cargo interests to attempt to improve their chances of recovery by suing the inland carrier in addition to the contracting carrier.

[9] *See generally* Marc Levinson, *The Box* 1-4 (2006) (suggesting that the container shaped the world economy by reducing the time and costs of shipping); Henry A. Tombari,

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SUMMARY OF ARGUMENT

As more fully explained below, the concept of mutual insurance underpins the liability cover effected by the owners of the great majority of the world's ocean-going ship tonnage. Mutual insurance depends on known and predictable liability regimes. The Carmack Amendment does not provide a knowable and consistent liability and if applied, as it was by the court below, to multimodal through bills of lading, it will increase the potential liability during the U.S. land-based leg of international carriage. This increase of potential liability will increase the cost of insurance and ultimately the cost of international trade to and from the U.S. It will also increase the likelihood, cost and complexity of litigation of cargo claims.

However, the decision below should not stand because the Carmack Amendment simply does not apply to carriage of goods between a non-adjacent foreign country and a place in the United States. It only applies to carriage from one U.S. state or territory to another or to carriage between an adjacent foreign country and a place in the United States. This limited foreign application makes sense

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Trends in Oceanborne Containerization and its Implications for the U.S. Liner Industry, 10 J. Mar. L. & Com. 311, 311-12 (1979). ("Overall, the advantages of containerization over the breakbulk system are to reduce (i) the time and effort needed to handle cargo; (ii) possible theft and damage; (iii) time required to move from point of origin to final destination and (iv) a ship's turn around time in port.").

and allows one liability regime to govern international multimodal carriage, including the U.S. inland portion of that carriage. It allows the carrier to extend its defenses and limitation via its Himalaya Clause[10] to all parties that it subcontracts to perform a particular part of a carriage.

The scope of Carmack was quite clear before Congress attempted in 1978 to clarify and modernize its language by recodification. The pre-1978 recodification language clearly described Carmack's scope of foreign carriage application to carriage between the United States and adjacent foreign countries. 49 U.S.C. § 20(11) (1976).

Congress clearly stated that the 1978 recodification was not intended to change the substance of the Carmack Amendment. Despite that clear introductory paragraph in the recodification bill,[11] the 1978 language has been interpreted by two circuits, the Second Circuit and the Ninth Circuit, to have made a very important substantive change by extending Carmack's scope from carriage between the United States and adjacent foreign countries to all foreign countries.

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[10] The term "Himalaya Clause" derives its name from the *S/S Himalaya*, which was involved in *Adler v. Dickson*, [1955] 1 Q.B. (C.A. 1954) (*reprinted at* 2009 AMC 2917), and is used to describe provisions that extend maritime liability limitations. *See, e.g., Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 20 n. 2 (2004).

[11] Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack], 92 Stat. 1359 (1978), 49 U.S.C. §§ 10730 and 11707.

If allowed to stand, the lower court opinion in this case would also severely harm the uniformity sought by the United States while negotiating the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, the Rotterdam Rules, which were approved by the U.N. General Assembly on December 11, 2008.[12] One of the first issues negotiated by the UNCITRAL[13] Working Group III that drafted the Convention determined whether the new Convention would govern during the entire door-to-door multimodal carriage or only during the ocean port-to-port portion of the carriage.

The Convention provides that its terms will govern contracts between shippers and contracting carriers for the entire door-to-door carriage with the exception that where loss, damage or delay in delivery occurs prior to loading or post-discharge, the provisions of any other compulsorily applicable international instrument that governs liability, limitation of liability, or time for suit will prevail over the provisions of the Convention.[14] That exception does not involve carriage in the United States.

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[12] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ("Rotterdam Rules"), Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122.

[13] United Nations Commission on International Trade Law.

[14] Rotterdam Rules, Article 26.

The Convention will govern multimodal contracts of carriage, including the inland U.S. portion. Although the Rotterdam Rules will govern the U.S. inland portion of the contract between cargo interests and the contracting carrier, the Rotterdam Rules will not govern actions between the contracting carrier and inland sub-contracted carriers such as railroads or trucking companies. The Rotterdam Rules would also not govern a tort action by cargo interests against a U.S. inland rail or road carrier.

Complete door-to-door uniformity of laws governing liability in the United States may be extended to the U.S. railroads and trucks through the contracting carrier's Himalaya Clause if the decision of the lower court is reversed. However, if the Carmack Amendment is applied then there cannot be uniformity for the entire carriage.

This Court emphasized in *Kirby*, 543 U.S. 14, the need for uniformity in the law governing contracts for multimodal carriage and demonstrated the use of Himalaya Clauses to achieve uniformity by extending COGSA to the U.S. inland carriage:

> Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*,[15] when "a [maritime] contract

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[15] *Kossick v. United Fruit Co.*, 365 U.S. 731 (1960).

> . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29.

The lower court in this case recognized the policy expressed by this Court in *Kirby*,[16] but claimed that the "plain meaning" of Carmack, a federal statute, took precedence over COGSA.[17]

The lower court opinion would prevent the uniformity of law sought by the United States while negotiating the Rotterdam Rules and by this Court in deciding *Kirby*. *Id.*

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[16] "Defendants fairly argue that policies recently endorsed by the Supreme Court-such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers-recommend applying COGSA here. *See Kirby*, 543 U.S. at 29, 125 S.Ct. 385." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F.3d 985, 992 (9th Cir. 2009); Pet. App. 12a.

[17] "The policy of uniformity in maritime shipping law, however compelling, must give way to controlling statutes and precedent. Given *Neptune*'s [*Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir. 2000)] holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not sufficient by itself to overcome Carmack." *Id.* at 998; Pet. App. 26a.

ARGUMENT

I. MUTUAL INSURANCE BRINGS SECURITY AND STABILITY TO INTERNATIONAL TRADE. IT DEPENDS ON PREDICTABLE LIABILITY REGIMES GOVERNING MULTI-MODAL TRANSPORTATION.

The great majority of the world's ocean-going shipping tonnage is insured by the Clubs. Clubs are "associations of shipowners banded together to spread and absorb the liabilities falling on their members."[18] Mutual protection and indemnity insurance emerged in the mid-nineteenth century when shipowners sought ways to protect themselves for liability for newly recognized third-party risks that other types of underwriters were not interested in covering.[19] The Group is a non-profit organization comprised of thirteen principal individual non-profit making Clubs, which provide liability cover to approximately 92% of the world's ocean-going ship tonnage and which share or pool their larger claims. Mutual insurance provides security and stability to international maritime trade because the claims of individual shipowners are secured not by a single insurer, but rather by the owners of 92% of the

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[18] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 76 (2d ed. 1975).

[19] Mark Tilley, *The Origin and Development of the Mutual Shipowners' Protection & Indemnity Associations*, 17 J. Mar. L. Com. 261, 262-65, 267 (1986).

world's ocean-going ship tonnage if a claim exceeds each Club's individual retention, currently $7 million.

The concept of mutuality underpins the successful operation of risk and claims sharing amongst member shipowners at the individual Club level, i.e., claims within the Club retention and between Clubs at the pooling level, i.e., claims in excess of Club retention. The pooling of claims is achieved by way of the pooling agreement, which, inter alia, defines the risks and claims that can be pooled and provides the mechanism by which pool claims, i.e. those claims that exceed each Club's individual retention up to approximately $6 billion per occurrence, are shared amongst the Clubs (although claims between $50 million and $3.05 billion each and every occurrence are protected by market reinsurance purchased collectively through the International Group). The pooling or mutualizing of risks reduces financial volatility for individual Clubs, since the individual Club does not itself have to meet a large claim in a short time frame, but pools/shares it with other Group Clubs. However, the pooling mechanism is structured in such a way that over time each individual Club will repay to the pool what it takes from the pool. No premium is paid by Clubs with respect to pool claims; each Club's contribution to such claims is calculated in accordance with the mechanism contained in the pooling agreement, which in part will depend upon the tonnage entered with the individual Club, the premium paid by that Club's members to the Club and the Club's pool

claims record. As these factors vary from policy year to policy year so will a Club's contribution to the pool.

Club policy terms are set out in each Club's Rules. As will be appreciated, Club Rules cannot and do not differ in substance because of the pooling arrangements.

Mutual insurance depends upon known and predictable liability regimes. The basic premise, which the Clubs apply when determining what risks they collectively will cover and the extent of that cover in relation to any particular risk, for example loss and damage to cargo, is whether the risk can be mutualized, that is whether it is a risk common to the great majority of the Clubs' memberships and whether members will be exposed to the same or similar liability in relation to the risk. Accordingly the Clubs, when determining the benchmark for the cover that they will provide, will look to widely adopted and well-established liability regimes. In the case of contracts for the carriage of cargo by sea, the liability cover provided by the Clubs in all but very limited cases, is that established by the Hague, the Hague/Visby Rules and COGSA liability regimes.[20] Claims that a carrier by sea incurs under a contract on terms less favorable than Hague or the Hague/Visby are not covered to the extent they exceed the Hague or Hague/Visby liabilities although Clubs have a discretion to admit such claims.

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[20] *See* note 4.

The Carmack Amendment has no standard limitation of liability. Instead, Carmack permits U.S. inland carriers to agree to varying limitations of liability and other contractual terms if certain conditions are met. The parties to contracts for interstate carriage may and do agree to various different amounts of liability for different contracts. Limits vary from railroad to railroad, from trucker to trucker, and from contract to contract. The resulting inconsistency prevents uniformity of risks, which is necessary for mutual insurance. If the opinion below were not overturned and if Carmack were applied as it was in the decision below, the Clubs might well impose a penalty for those members trading in the high risk area of the United States, where Carmack Amendment rulings are common. If the Clubs know that over a period of time claims will deteriorate due to application of Carmack to multimodal carriage, premiums would likely be adjusted upwards for individual members trading in such areas, or possibly a surcharge would be imposed on insuring the U.S. inland portion of multimodal carriage.

In addition to the uncertainty of the liability limit applicable in any particular case, the expense of resolving disputes would be increased by the expense of determining where the damage occurred or was caused. If cargo were lost or damaged sometime during a multimodal carriage, and Carmack applied to a portion of the carriage, the location of the cargo at the time the loss or damage occurred or was caused would have to be determined before the parties could

know which law governed the loss or damage. This requirement would needlessly increase the cost of discovery and claims handling and would delay the claims handling procedure. If COGSA applied throughout the multimodal carriage, there would be no need to prove where the damage was caused or occurred.

II. THE CARMACK AMENDMENT DOES NOT GOVERN CARRIAGE BETWEEN A NON-ADJACENT FOREIGN COUNTRY AND A PLACE IN THE UNITED STATES.

The Carmack Amendment's jurisdiction is limited to carriage from one state or territory of the United States to another, or between an adjacent foreign country and a place in the United States. Prior to 1978, the plain text of the Carmack Amendment clearly limited its foreign carriage scope to carriage "from any point in the United States to a point in an adjacent foreign country," i.e. exports to Canada and Mexico. 49 U.S.C. § 20(11) (1976); Pet. App. 98a; *see also Aaacon Auto Transp., Inc. v. State Farm Mut. Ins. Co.*, 537 F.2d 648, 652 n. 7 (2d Cir. 1976) (quoting 49 U.S.C. § 20(11)). When Congress recodified the statute in 1978, Congress linked the description of Carmack's scope of application to the jurisdiction of the Interstate Commerce Commission, later the

Surface Transportation Board.[21] The jurisdiction of the Surface Transportation Board was described in the recodification as shipments "between a place in . . . the United States and a place in a foreign country." *See* 49 U.S.C. § 10501(a)(2); Pet. App. 62a. It has been argued that this language suggests that the Carmack Amendment applies to all exports and imports between the United States and all foreign countries and has drastically amended the scope of application of Carmack. *See* Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. Mar. L. & Com. 1, 34 (2009).[22] This argument is contrary to Congress's expressed intent not to change the law by recodification and is contrary to the law concerning recodification.

Despite the omission of the "from . . . to" and "adjacent" language in the jurisdictional statement in the 1978 recodification, Congress has made it clear that it did not intend the recodification to change the

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[21] The Surface Transportation Board is the successor to the Interstate Commerce Commission.

[22] Nevertheless, Professor Michael F. Sturley has explained that recodification is "not intended to make any substantive change in the law." *See* Michael F. Sturley, "Reflections on the Recodification of Title 46", 2 *Benedict's Maritime Bulletin* 209, 212 (2004). Professor Sturley basically argues that Congress intended to make substantive changes even though Congress stated in the introduction to the recodification bill that was not the intent, and even though recodification does not make substantive changes.

substance of the Carmack Amendment. *See Riduco, S.A. v. A.P. Moller-Maersk A/S*, Civ. No. 08-3008, 2009 WL 4680197, *3 (N.D. Ill. Dec. 7, 2009) ("because this language was added as part of the recodification of the Interstate Commerce Act in 1978, and the re-codification was not intended to work a substantive change, the language must be read in conjunction with the pre-1978 Interstate Commerce Act.") (citing *Keene Corp. v. U.S.*, 508 U.S. 200, 209 (1993)). Accordingly, the Carmack Amendment should not apply to shipments between the United States and a non-adjacent foreign country that are governed by a through bill of lading.[23] The Fourth, Sixth, Seventh, and Eleventh Circuits have all held that the Carmack Amendment does not apply to the inland leg of a multimodal shipment under a through bill of lading. *See, e.g., Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565 (6th Cir. 2003);

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[23] In *Toshiba Int'l Corp. v. M/V Sea-Land Express*, 841 F. Supp. 123, 128 (S.D.N.Y. 1994), Judge Leval explained that a "through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract." (Citing *Capital Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir. 1992)). The Clubs and Group respectfully agree with Judge Leval's holding in this case that "whether the limitation provided by the bill of lading extends its protection to . . . inland carriage also turns on whether it is a 'through bill of lading.' If so, the Carmack Amendment, which might otherwise apply to the inland portion of the journey and disallow a limitation on liability, does not apply." *Id.* (citing *Capital Converting Equip.*, 965 F.2d at 394).

Capital Converting Equip., Inc. v. LEP Transp., Inc., 965 F.2d 391 (7th Cir. 1992); *Swift Textiles, Inc. v. Watkins Motor Lines*, 799 F.2d 697 (11th Cir. 1986).[24] These holdings are consistent with Congress's intent to continue to limit the Carmack Amendment's application only to domestic shipments or shipments between the United States and an adjacent foreign country.

In *Riduco, S.A.*, 2009 WL 4680197, at *2, the Northern District of Illinois recently considered whether the Carmack Amendment applies to an international multimodal shipment from the United States to Columbia, covered by a through bill of lading. The court noted the circuit split on the issue of whether the Carmack Amendment applies in cases involving imports from a non-adjacent foreign country under a through bill of lading. *Id.* at *4. The court was guided by the Seventh Circuit's decision in *Capital Converting Equip., Inc. v. LEP Transp. Inc.*, 965 F.2d 391, 394 (7th Cir. 1992) which held that the Carmack Amendment did not apply to a shipment between a non-adjacent foreign country and the United States that was covered by a through bill of lading. *Id.* at *2. The *Riduco* court explained that "[d]espite the omission of the 'from . . . to' and

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[24] By contrast the Ninth Circuit in the opinion below, and the Second Circuit in *Sompo Japan Ins. Co. v. Union Pacific R.R. Co.*, 456 F.3d 54, 68-69 (2d Cir. 2006), have erroneously held that the Carmack Amendment applies to the inland leg of a continuous multimodal shipment.

'adjacent' language in the 1978 recodification of the Carmack Amendment, Congress made it clear that it did not intend to work a substantive change in the law." *Id.* at *3. Accordingly, the *Riduco* court held that "the Carmack Amendment does not apply to the shipment in this case from the United States to Columbia, a non-adjacent foreign country, under a through bill of lading." *Id.*

Congress's intent was made clear in the introduction to the recodification which states, "to revise, codify, and enact *without substantive change* the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code." 1978 Recodification, Pub. L. No. 95-473, 49 U.S.C. § 10501 [Carmack], 92 Stat. 1359 (1978) (emphasis added); Pet. App. 90a. Additionally, a House Report regarding the 1978 recodification explains that "[l]ike other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law." H.R. Rep. No. 95-1395, at 9, *reprinted at* 1978 U.S.C.C.A.N. 3009, 3018:

> It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold

> the contrary presumption: the statute is intended to remain substantively unchanged.

Moreover, it is widely accepted that when interpreting a recodification it should be presumed that the law is intended to remain substantively unchanged. *See, e.g., Keene Corp. v. U.S.*, 508 U.S. 200, 209 (1993) (courts should not presume that a comprehensive revision "changed the underlying substantive law unless an intent to make such a change is clearly expressed."); *U.S. v. Booky*, 733 F.2d 1335, 1337 n. 3 (9th Cir. 1984) (finding language present in original section of code, but absent in recodified section, must be read into recodified section when absence of language creates a substantive change); *Atchison, Topeka and Santa Fe Railway Co. v. U.S.*, 617 F.2d 485, 491 (7th Cir. 1980) ("Congress has unequivocally forbidden any interpretation that would substantively change the [Interstate Commerce Act]").

Furthermore, the argument that the Carmack Amendment applies to shipments to and from non-adjacent foreign countries is erroneous as it conflicts with the original purpose of the Amendment. In 1887, Congress enacted the Interstate Commerce Act and established the Interstate Commerce Commission for the purpose of establishing uniform law applicable to interstate shipments. *See* Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887); William C. Baldwin, *Land Versus Sea; Carmack Versus COGSA: Why the Carmack Amendment Should Not Apply to Inland Portions of Multimodal Shipments*, 82 Tul. L.

Rev. 731, 737-38 (2007). The 1906 Carmack Amendment to the Interstate Commerce Act applied originally only to interstate commerce and did not apply to foreign shipments of any kind. 49 U.S.C. § 20(11) (1976). The Amendment originally read: "That any common carrier . . . receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor. . . ." An Act to Regulate Commerce, ch. 3591, 34 Stat. 593 (1906); Harvard Law Review, *Foreign Commerce and the Interstate Commerce Act*, 40 Harv. L. Rev. 1130, 1134 n. 21 (1927); *J.H. Hamlen & Sons Co. v. Illinois C.R. Co.*, 212 F. 324 (E.D. Ark. 1914).

The addition of the Cummins Amendments in 1915, by express reference brought the liability of a carrier engaged in transportation "from a point in the United States to a point in an adjacent foreign country" within the scope of the Carmack Amendment. *See* 40 Harv. L. Rev. 1130. The Amendments did not include non-adjacent foreign countries. Accordingly, courts routinely held that the Carmack Amendment was not applicable to shipments to and from non-adjacent foreign countries. *See, e.g., Missouri P. R. Co. v. Porter*, 273 U.S. 341 (1927) (Carmack Amendment inapplicable to a bill of lading for a shipment of a load of cotton being shipped from the State of Georgia to England because England was a non-adjacent foreign country); *Cudahy Packing Co. v. Munson S.S. Line*, 22 F.2d 898 (2d Cir. 1927) (Carmack Amendment inapplicable to a suit by a shipper of hams from Iowa to Havana, Cuba because

Cuba was a non-adjacent foreign country). Although the Carmack Amendment has been further amended and recodified, nothing has changed the original purpose or the substance of the Carmack Amendment regarding its inapplicability to shipments to and from non-adjacent foreign countries.

Congress's original purpose in enacting the Interstate Commerce Act and later the Carmack Amendment was to create a uniform statutory framework for the carriage of cargo domestically and between the U.S. and adjacent countries. To stray from Congress's intent by applying the Carmack Amendment to the carriage of cargo between non-adjacent countries and the United States destroys uniformity and drastically undermines the original purpose of the Interstate Commerce Act and the Carmack Amendment.

III. THE PRACTICAL RESULT OF THE DECISION OF THE LOWER COURT IN THIS MATTER IS OPPOSITE TO THE RESULT ACHIEVED BY THIS COURT IN *NORFOLK SOUTHERN RY. CO. V. JAMES N. KIRBY PTY LTD.*

This Court explained the advantages of uniform law governing multimodal carriage in *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004).

Kirby presented multimodal carriage that was slightly more complicated than the carriage in this case. In *Kirby*, the shipper of cargo (Kirby) contracted

with a Non-Vessel Operating Common Carrier (NVOCC) to carry cargo from Sydney, Australia to Huntsville, Alabama. The NVOCC contracted with a Vessel Operating Common Carrier (VOCC) also to carry the cargo from Sydney to Huntsville, Alabama. The VOCC contracted with a railroad (Norfolk Southern) to carry the cargo over land from the U.S. port of entry, Savannah, Georgia, to Huntsville, Alabama. The contract for the entire shipment was evidenced by the NVOCC through bill of lading issued to Kirby, and by the VOCC through bill of lading issued by the VOCC to the NVOCC. *Kirby*, 543 U.S. at 19.

This Court held that the bill of lading was a maritime contract, and therefore, was governed by federal law. The Court stated:

> Likewise, a single Himalaya Clause can cover both sea and land carriers downstream. . . . Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning. As we said in *Kossick*, when "a [maritime] contract . . . may well have been made anywhere in the world," it "should be judged by one law wherever it was made." Here, that one law is federal.

Id. at 29 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1960)). This Court explained that the defenses and limitations in the NVOCC bill of lading

protected all the parties that helped perform the multimodal carriage, including the railroad.[25] The limitation contained in the VOCC bill of lading was lower than the NVOCC's bill of lading limitation and there was no direct contract between Kirby and the VOCC. This Court held that the NVOCC had acted as Kirby's limited agent to bind Kirby to the limitation contained in the VOCC's bill of lading. The lower VOCC limit was extended to the railroad by the Himalaya Clause in the VOCC's bill of lading.

The case at bar is simpler and no limited agency theory is necessary. The cargo shipper, Regal-Beloit Corporation, et al. contracted with Kawasaki Kisen Kaisha, Ltd. (K-Line) to carry cargo from China to various inland destinations in the United States. K-Line's U.S. agent, K-Line America, contracted with the Union Pacific Railroad Company (UPRR) for the inland carriage. K-Line Pet. App. at 9.

Kirby's reasoning applies a fortiori here: It suggests that K-Line's Himalaya Clause extended the

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[25] As COGSA permits, Hamburg Süd in its bill of lading chose to extend the default rule to the entire period in which the machinery would be under its responsibility, including the period of the inland transport. Hamburg Süd would not enjoy the efficiencies of the default rule if the liability limitation it chose did not apply equally to all legs of the journey for which it undertook responsibility. And the apparent purpose of COGSA, to facilitate efficient contracting in contracts for carriage by sea, would be defeated.

Kirby, 543 U.S. at 29.

terms of K-Line's contract, including a choice of forum clause, to the railroad. K-Line would of course be entitled to that choice of forum clause as well. *See Vimar Seguros Y Reaseguros, S.A. v. M.V. Sky Reefer*, 515 U.S. 528, 541 (1995) (holding that foreign arbitration clauses in a bill of lading are valid under COGSA). However, the decision below is in conflict with the reasoning of *Kirby*, and if the decision below is upheld more than one body of law will govern the multimodal contract at issue here. Reversal of the lower court decision in this case will allow parties to contracts for multimodal carriage to enjoy the efficiencies described by this Court in *Kirby*.

IV. THE RESULT BELOW IS IN TENSION WITH THE WELL-REASONED POSITION OF THE UNITED STATES IN RECENTLY COMPLETED TREATY NEGOTIATIONS FOR THE ROTTERDAM RULES, WHICH IS THAT ONLY ONE LAW SHOULD GOVERN ALL ASPECTS OF INTERNATIONAL, MULTIMODAL, DOOR-TO-DOOR CARRIAGE OF GOODS.

The United States played an active role in negotiating a Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, which was recently completed by the United Nations Commission on International Trade Law (UNCITRAL) and approved on December 11, 2008 by

the United Nations General Assembly.[26] It was signed in Rotterdam on September 23, 2009 by several nations including the United States. The Rotterdam Rules will not affect the decision in this case. The lower court opinion in this case, if allowed to stand, would however prevent one law from governing the entire door-to-door multimodal carriage whether that one law were COGSA or the Rotterdam Rules.

The United States stated its position[27] during the Rotterdam Rules negotiation as follows:

> I. Scope of application and performing parties . . .
>
> > 5. As part of the overall package, the United States supports a door-to-door regime on a uniform liability basis as between the contracting parties, subject to a limited network exception. This means that the contracting carrier's liability to the cargo interests would always be resolved under the Instrument's own substantive liability provisions (including the Instrument's own limitation and exoneration provisions) except when the network principle

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[26] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Dec. 11, 2008 General Assembly Resolution 63/122, Annex, U.N. Doc. A/RES/63/122.

[27] UNCITRAL, 12th Sess., Working Group III at 3, A/CN.9/WG.III/WP34 (Aug. 7, 2003) *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V03/869/05/PDF/V0386905.pdf?OpenElement.

> applies to supersede these provisions. To provide the maximum degree of uniformity possible, we would keep the network exception as narrow as possible. The narrow network exception contained in article 4.2.1 of the Draft Instrument would be acceptable to the United States.[28]

The network exception referred to a desire by European Nations to have their road and rail conventions[29] govern damage or loss on European roads or rails.

While the Convention will govern a multimodal carrier's liability to cargo interests during U.S. inland carriage, it will not apply directly to the railroad or trucking company acting as subcontractor to the carrier and referred to by the Rotterdam Rules as a "performing party."[30] The United States indicated that the carrier's Himalaya Clause should preserve

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[28] *Id.* The 2003 draft of the Instrument, A/CN.9/WGIII/WP.21, was referred to when discussing the narrow network exception. It may be found at Article 26 in the Rotterdam Rules. It does not affect the U.S. inland part of a multimodal move.

[29] *See* Convention on the Contract for the International Carriage of Goods By Road (CMR), May 19, 1956, 399 U.N.T.S. 189; Appendix B to the Convention Concerning International Carriage by Rail (COTIF) of May 9, 1980, and Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), 2 International Transport Treaties, V-213 (Wolters Kluwer, Supp. 1-10 Jan. 1986).

[30] Rotterdam Rules, Article 1(6)(a).

uniformity by applying the carrier's defenses to the railroad or motor carrier:

> With regard to other performing parties, the Instrument should not create new causes of action or preempt existing causes of action. For example, the liability of an inland carrier (e.g., a trucker or a railroad) should be based on existing law. In some countries, this may be a regional unimodal convention. . . . In others, it may be a mandatory or non-mandatory domestic law governing inland carriage, or the generally applicable tort law. In some countries, cargo interests may not have a cause of action against inland performing parties. Preserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya clause to claim the benefit of the contracting carrier's rights under the Instrument. The Instrument should neither increase nor decrease these existing rights.

Id. ¶ 7.

The present and future reliance by U.S. inland carriers on Himalaya Clauses would be destroyed if the lower court opinion were allowed to stand. To interpret Carmack contrary to the clear meaning and intent expressed by Congress before the 1978 Recodification and specifically prescribed by the recodification bill would severely harm the uniformity described in *Kirby* and the uniformity sought by the

United States in the future Rotterdam Rules and would increase the expense of U.S. foreign trade.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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December 30, 2009.

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